IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-164

SPIEGEL, INC.,

Appellant

v.

STATE OF SOUTH DAKOTA, ex rel. MARK V. MEIER-HENRY, Attorney General for the State of South Dakota, and TRUDY PETERSON, for herself and all others similarly situated,

Appellees

On Appeal From The Supreme Court of South Dakota

REPLY BRIEF OF APPELLANT

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I. NOTHING IN THE OPINION OF THE SOUTH DAKOTA SUPREME COURT OR IN THE RECORD BELOW SUPPORTS APPELLEES' ASSERTION THAT OTHER INTERSTATE RETAILERS CAN ENGAGE IN CREDIT SALES UNDER A 12% FINANCE CHARGE LIMITATION ON AN ECONOMICALLY VIABLE BASIS.

In response to Spiegel's contention that the South Dakota 12% finance charge limitation imposes an unreasonable burden on interstate commerce because it is so severe as to effectively bar interstate credit sales on an economically

viable basis, Appellees assert that "Spiegel is apparently the only national merchandiser who shares this view, because the South Dakota Supreme Court quite obviously recognized and took judicial notice of the fact that many other national retailers who offer revolving credit operate within the law and have not been effectively barred from sales within South Dakota." Motion to Dismiss Appeal at p. 3. There is absolutely nothing in the opinion of the South Dakota Supreme Court to indicate that it took "'judicial notice" of any such "fact." Nor is there anything in the record below on this point.

Indeed, it is the failure of the South Dakota court to make any factual inquiry into the impact of the South Dakota limitation which, Spiegel submits, is in direct contradiction with this Court's Commerce Clause decisions and, in itself, warrants reversal of the decision below. It is no response to the failure of the South Dakota court to make this constitutionally-mandated inquiry for Appellees to attempt now to make factual assertions which might have been made, and tested, if the South Dakota court had made the inquiry which the Constitution mandates.

Further, all published studies, of which judicial notice may be taken, indicate that profitable retail credit sales operations are impossible at a 12% rate. See Jurisdictional Statement at pp. 15-16. If any interstate seller is engaged in credit sales with a 12% finance charge, factual inquiry would demonstrate, Spiegel submits, that such seller is either adjusting its prices (which is impossible for an interstate catalog seller such as Spiegel) or is making credit sales on an unprofitable basis for other reasons such as maintenance of customer goodwill in connection with non-credit sales.

Appellees argue that the impact of the South Dakota finance charge limitation on interstate sellers such as Spiegel

raises merely an issue of "legislative policy." Motion to Dismiss Appeal at p. 4. On the contrary, the impact of a limitation on interstate sales raises a constitutional question under the Commerce Clause, which requires an assessment and a balancing of any such adverse impact against the benefits of the limitation. See Jurisdictional Statement at pp. 9-15. The need for such inquiry is heightened in this case because of the patently discriminatory differential, which Appellees make no effort to justify, between the 12% limit and the 24% rate allowed to the predominantly local bank industry on its credit cards. See Jurisdictional Statement at pp. 16-18.

II. THE AMOUNT OF MONEY INVOLVED IN THIS CASE HAS NO BEARING ON THE SUBSTANTIALITY OF THE CONSTITUTIONAL QUESTION RAISED.

Appellees assert that "insofar as the order [of the South Dakota Supreme Court] directing Spiegel to reimburse Trudy Peterson for the few dollars of interest it collected from her [in excess of the 12% limitation applicable in South Dakota until July 1, 1979], it can hardly be said that this portion of the judgment raises a 'substantial federal question.'" Motion to Dismiss Appeal at pp. 4-5. But the fact that the decision involves a small amount of money in no way diminishes the substantial nature of the constitutional question raised by the South Dakota statute. The question of whether the South Dakota limitation is constitutional is the same whether it is raised in a case involving a single sale and a small amount of interest or a case involving thousands of sales and thousands of dollars in interest.

Further, although this case has not been certified as a class action and therefore in its monetary aspect involves only the interest paid by Appellee Peterson, class actions

raising the same issue have already been filed against Spiegel and another interstate catalog seller in South Dakota, and the same issue is raised by statutory limitations in other states. See Jurisdictional Statement at pp. 7, 21.

This Court must face and decide the question of whether the states have unfettered discretion to impose finance charge limitations on interstate credit sales, however severe the impact on interstate sellers, or whether such limitations are subject to the balancing test set forth in this Court's Commerce Clause decisions. The judgment herein that Spiegel must return to plaintiff Peterson all finance charges paid by her because the rate exceeded the then-applicable 12% limitation directly raises this substantial federal question. The amendment of the South Dakota statute to permit an 18% finance charge effective July 1, 1979 (see Jurisdictional Statement at p. 7) has in no way mooted or eliminated the substantial constitutional question presented by such judgment.

Respectfully submitted,

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